SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. 374.

HAYWOOD WASHUM, an Individual, d/b/a LOS ANGELES-YUMA FREIGHT LINES, and SVENSSON FREIGHT LINES, an Arizona Corporation,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPERSTATE LINES, CONSOLIDATED FREIGHT WAYS CORPORATION OF DELAWARE, HOPPER TRUCK LINES, LEE WAY MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., PACIFIC MOTOR TRUCKING COMPANY, THUNDERBIRD FREIGHT LINES, INC., T. I. M. E. FREIGHT, INC., and WESTERN GILLETTE, INC.,
Appellees.

Appeal from the United States District Court for the District of Arizona.

APPELLANTS' REPLY TO MOTIONS TO AFFIRM.

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The argument advanced by the government in the Motion to Affirm at the bottom of page 5 and continuing to page 6 in the statement that

> "The Commission's holding that Svensson's certificate of registration was improvidently granted was not in issue, either before the Commission or in the court below"

comes somewhat as a shock to the appellants. It serves only to point up that about which they have continuously complained from the inception of this proceeding to the present, which, in effect, is that one of the pivotal considerations in the Commission's determination that the certificate of Svensson had been improvidently granted, and that its registration therefore was void ab initio was necessarily by definition incorrect.

The record in this proceeding will reflect that prior to the time of its purchase by Don Washum, the certificate of Svensson had been the subject of an earlier equivalent of registration in that it was a "second proviso" operator who had authority under the law prior to the enactment of 49 U. S. C. 306(a)(7)(A) to operate within a single state without the type registration required since October 15, 1962, of single state operators.

The registration of the Svensson certificate by its present owner, Don Washum, effectuated pursuant to 49 U. S. C. 306(a)(7)(A), was merely a continuation in effect of the operations previously conducted under the second proviso of the Motor Carrier Act as it stood prior to the amendment which became Section 206(a)(7)(A).

Since the authority originally was issued to an individual named Svensson, subsequently incorporated into the corporation which is Svensson Freight Lines, long before there was any relationship between any of the Svenssons and any of the Washums, a finding that the registration was void ab initio is simply incorrect.

Svensson received its substantive right to transport interstate commodities as a single state operator by virtue

of a so-called "second proviso" registration long before it was owned by Don Washum. In 1962, the Interstate Commerce Act, Section 206(a)(7)(A) was amended so as to award single state operators an actual certificate in lieu of their former registration. All single state carriers having valid second proviso registrations at that time had only to file an application to be awarded the permanent certificate. That procedure was nothing more than a mechanical device by which one form (the registration) which evidenced the substantive right to transport interstate traffic was changed by the substitution of another form (the certificate). The substantive right actually accrued to Svensson in the 1950's and has never in fact been revoked by due process of law.

That being the case, the actions of the Commission in this matter have not conformed with its statutory requirements in connection with the handling of applications. Svensson filed two applications, one of which was an effort to convert its Section 206(a)(7)(A) certificate into a full fledged certificate of public convenience and necessity. The burden of proof for so doing has never been as stringent as the burden of proof for the institution of a new operation, so that in order to convert such certificate, a showing is generally needed only that the transportation involved is in progress and that it is in the public interest for it to continue. In this case, the Commission found that since the Section 206(a)(7)(A) certificate was void in its incipiency, that there was nothing to convert and therefore put Svensson to the much sterner burden of proving convenience and necessity for a totally new operation which was not a burden which Svensson was required to bear, nor one which it conceived it was required to bear at the time of the hearing.

Furthermore, the Commission has always held that past unlawful activities by an applicant are not an absolute bar

to the granting of any application. In that connection, the Commission has always held that it was required to balance the proof of public need and the proof of public interest against the alleged unlawful activities. In those cases where the public interest or public need outweighed the effects of the unlawful activity, the Commission has granted the applications.

Here, since the Commission found that there was no certificate to convert, it in no way balanced any of the equities arising from the public need or public interest against the unlawful activities complained of, with the result that the public is now to be deprived of a service which it both needs and has enjoyed for some years and the Washums are to be put out of business.

The proceedings in the District Court challenged the orders of the Interstate Commerce Commission and recited at page 5 that the plaintiff prayed that:

> "The orders of the Interstate Commerce Commission entered heretofore in the above referred to matters be annulled and set aside."

It comes with ill grace now for the government to take the position that the matter was not raised and was not an issue before the Commission and before the District Court.*

To advance, as is advanced in the argument supporting the Motion to Affirm, that the only matters before the District Court had to do with the substantiality of the evi-

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* Since also, as reflected by the testimony in the proceeding, everything which was done either by Svensson or its owner, Don Washum, was done with the advice and approval of a representative of the Commission, it comes with similar ill grace for the Commission to say that with full knowledge of whatever conditions were at the time of the registration of the Svensson certificate, it participated in the issuance of an invalid registration and a subsequent unlawful certificate.

dence is a distortion of the proceeding. Obviously, the defendants in the complaint proceeding before the Commission, plaintiffs in the court below, took issue with every factual matter which might conceivably be presented in the Commission proceeding, and these same parties brought before the District Court every conceivable issue available to them then, as they now bring before this court every issue which may be presented within the confines of a jurisdictional statement and Reply to a Motion to Affirm. Other matters require plenary briefs and argument.

We do not understand that there was at the time, or that there is now, any impropriety in a defendant in a complaint proceeding or a plaintiff in a review proceeding before a District Court raising every issue of which the case admits. We are not advised by the law nor persuaded by the pleading on behalf of the government that only questions of substantiality of the evidence may be raised when the Interstate Commerce Commission has acted without warrant in the law. This case in its present posture and in its posture before the District Court posed and presented questions of substance, among which were questions of the substantiality of the evidence, but neither the complaint, the argument, nor the pleadings circumscribe the proceedings to the extent that only questions of substantiality of evidence were raised. That assertion, coupled with the quotation from the District Court's opinion that the Commission's findings were supported by substantial evidence, appears to be advanced as sufficient forever to lay this matter to rest. Such may evolve to be entirely correct, but the correctness will arise not out of the assertion on behalf of the government, but out of the adjudication by this Court.

On page 7 of the Motion on behalf of the government in a footnote, the assertion is made that the appellants

have erroneously characterized the authority held by Svensson. The record in this proceeding will reflect that, pursuant to this authority, without prior complaint before the Arizona Commission or before the Interstate Commerce Commission, from the date of the inception of motor carrier regulation until the present time, Svensson Freight Lines has been transporting commodities both eastbound and westbound between Yuma and Phoenix, as it has a perfect right to do.

The slight difference mentioned in our earlier pleading is provoked by the recognition that the Svensson authority lacked the unquestioned artistic draftsmanship of the government's Motion to Affirm. Nonetheless, the certificate says what it says, the certificate authorizes what it authorizes, and the parties most closely concerned with it for three decades have considered that it authorized eastbound transportation. Absent the government's statement to the contrary, it does authorize what the citizens of Arizona have considered it, being a creature of Arizona, to authorize.

Significantly, even the Joint Board, composed of Eddie Williams of Arizona, was not in a position to say, and did not say, that the certificate did not authorize eastbound transportation (JS A-57). He, smarting under charges of bribery advanced by these appellants, only questioned.

CONCLUSION.

In Summary, appellants have been deprived of valuable rights continuously exercised by them and their predecessors for more than a quarter of a century, in a manner that departs from lawfully authorized procedure.

Their redress is to them substantial, as are the questions here raised.

For these reasons, they pray that this Court note jurisdiction.

Respectfully submitted,

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